6-29-1976

Steven Simpson and Ronald Simpson v. Commonwealth of Kentucky

Appellant's Brief 1976-SC-0442

APPELLANT'S BRIEF

SUPREME COURT OF KENTUCKY

FILE NOS. 76-442 and 76-443

547 SW2d 451

STEVEN SIMPSON and
RONALD SIMPSON — APPELLANTS

VS. — APPEAL FROM MERCER CIRCUIT COURT
HON. HENRY V. PENNINGTON, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANTS

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Brief For Appellants has been mailed, postage prepaid, to Hon. Henry V. Pennington, Judge, Mercer Circuit Court, Mercer County Courthouse, Harrodsburg, Kentucky 40330; Hon. W. A. Wickliffe, Commonwealth Attorney, 50th Judicial District, Harrodsburg, Kentucky 40330; and Hon. Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 21st day of June, 1976.

Timothy T. Riddell

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MAY IT PLEASE THE COURT:

STATEMENT OF QUESTIONS PRESENTED

I.

DID THE TRIAL COURT COMMIT ERROR THAT SUBSTANTIALLY PREJUDICED APPELLANT, STEVE SIMPSON, WHEN IT ALLOWED THE JURY TO FIND HIM GUILTY OF WANTON ENDANGERMENT IN THE FIRST DEGREE?

II.

DID THE TRIAL COURT COMMIT ERROR OF REVERSIBLE MAGNITUDE AS TO BOTH APPELLANTS WHEN IT FAILED TO INSTRUCT ON WANTON ENDANGERMENT IN THE SECOND DEGREE?

STATEMENT OF THE CASE

On the 14th day of January, 1976, the Mercer Circuit Court Grand Jury returned Indictment No. 76-C-1 against Appellant, Steve Simpson, and returned Indictment No. 76-C-2 against Appellant, Ronald Simpson (Respective Transcript of Records, hereinafter T.R., p. 1). The identical indictments charged that Appellants, on or about the 27th day of September, 1975, committed the offense of first degree assault

on Bruce Raynes in violation of KRS 508.010(1)(b) (Id.)

On the 16th day of January, 1976, Appellants, through their appointed trial counsel, Hon. Douglas Greenburg, waived formal arraignment and entered pleas of not guilty to the charge in Indictment Nos. 76-C-1 and 76-C-2 (T.R., p. 2). Appellants' trial date was set for February 4, 1976 (T.R., p. 3). On that date the trial commenced and the testimony disclosed that on September 27, 1975, the prosecuting witness, Officer Bruce Raynes, was answering a dispatch concerning some property damage on Mann's Road in Mercer County when he saw Ronald and Jeffrey Simpson walking on that road (Transcript of Evidence hereinafter T.E., pp. 3-4). Ronald was arrested for being drunk in public and was placed in the car, and Jeffrey, the Appellants'16 year old brother walked away (T.E., p. 5). Raynes continued driving on Mann's Road for a while, turned around, and found Steve flagging down the car in almost the same place as Ronald's arrest (T.E., p. 6).

Raynes contended that when he approached Steve, that Steven told him that Ronald was not going to be arrested and that then Steve shoved him (T.E., p. 7). Raynes reacted by hitting Steve in the head with a blackjack and tried to arrest Steve for resisting the arrest of his brother (T.E., pp. 7,8). Steven resisted by hitting Raynes in the face with his fist (T.E., p. 8). Both Appellants testified that Steve initially withdrew from Raynes when Raynes attempted to place Steve under arrest for drunkenness which then led to Raynes striking him (T.E., pp. 75,90). Steve admitted hitting Officer Raynes in the face, but he stated that this happened only after Raynes hit him in the head (T.E., p. 90).

Steve had Raynes on the ground when Ronald let himself out of the car and joined them (T.E., p. 8). Raynes testified

that both Appellants rained blows to his head and face and he "assumed" they used the blackjack because of the peculiar balance of Appellants while sitting on him (T.E., p. 44). Raynes added that one of the Appellants said, "Get his gun and we'll shoot the son-of-a-bitch right here" (T.E., p. 9).

Appellant Ronald Simpson testified that he never hit Raynes, and that he took the blackjack away from Raynes to prevent the repeated hitting of Steve (T.E., p. 75). Appellant Steve Simpson said he only shook Raynes on the ground (T.E., p. 92). Jeffrey Simpson, Appellants' brother, and Walter Kelly, the man who walked up to the scuffle, testified they never saw Appellants using a blackjack nor did they hear the Appellants threaten to shoot Raynes (T.E., pp. 48, 112, 113).

As soon as Walter Kelly and Mike Young walked up, the scuffle ended and Ronald left in a passing car (T.E., pp. 14, 46). As Steve attempted to walk away Raynes hit him across the head with a night stick which broke on impact (T.E., p. 16). Raynes had drawn his gun on Steve by the time the Mercer County Sheriff had arrived (T.E., p. 58). Ronald was arrested a short time later behind his parents' home where Raynes helped run him down (T.E., p. 18).

Despite the introduction into evidence of Raynes' bloody shirt and photographs depicting Raynes' bloody face (T.E., pp. 12, 14), the testimony proved that Raynes sustained only a minor cut below his nose which did not even require a bandaid and swelling of the left side of the nose, neck and head (T.E., pp. 32, 109). Appellant Steven Simpson received four cuts in the head (T.E., p. 91).

The trial court's instruction to the jury encompassed second degree assault, first degree wanton endangerment and

third degree assault (T.R., pp. 6-8). The jury returned a verdict finding Steve Simpson guilty of first degree wanton endangerment and fixed his punishment at one (1) year (Steve Simpson, T.R., p. 11). Ronald was found guilty of third degree assault and his punishment was fixed at six (6) months and a fine of $500 (Ronald Simpson, T.R., p. 13).

Pursuant to said verdicts, the court below entered the final judgment in Appellants' case on February 25, 1976, (Steve, T.R., pp. 22-23; Ronald, T.R. pp. 24-25). On that same day, Appellants filed notice of their intention to appeal from the convictions on Indictment Nos. 76-C-1 and 76-C-2 (Steve, T.R., p. 26 and Ronald, T.R., p. 28). Accordingly, Appellants now prosecute this appeal.

ARGUMENTS

I.

THE TRIAL COURT COMMITTED AN ERROR WHICH SUBSTANTIALLY PREJUDICED APPELLANT STEVE SIMPSON, WHEN IT ALLOWED THE JURY TO FIND HIM GUILTY OF WANTON ENDANGERMENT IN THE FIRST DEGREE.

Appellant, Steve Simpson, was charged with committing "first degree assault upon Bruce Raynes by striking him with his fist, feet and a blackjack. . .thereby creating a grave risk of death and causing serious physical injury" (T.R., p. 1).

At the close of the Commonwealth's case the trial court made it clear that it would not instruct on the charged crime because there was "not one bit of testimony in this case to show that any serious physical injury was inflicted upon Trooper Bruce Raynes by means of a deadly weapon or a dangerous instrument, and that there was no wanton conduct which created a grave risk of death which caused serious physical injury" (T.E., pp. 71-72).

The trial court, however, made it clear that it intended to tender instructions to the jury on assault in the second degree, on wanton endangerment in the first degree and on assault in the third degree (T.E., pp. 72-73).

At the close of all the evidence Appellant Steve Simpson's counsel moved the trial court to instruct only on assault in the third degree (T.E., p. 115)

Steve's counsel objected specifically to an instruction on wanton endangerment in the first degree because that crime was not a lesser included offense under the indictment when considering the evidence adduced to support said indictment (T.E., p. 115). The trial court overruled said objection (Id.)

Soon thereafter the case against Steve was submitted to the jury and that body, after due deliberation, returned a verdict against Steve finding him quilty of wanton endangerment in the first degree and assessing his punishment at one year (Steve, T.R., pp. 11; 15).

Appellant Steve Simpson submits that the court below erred to his substantial prejudice when it allowed the jury to find him guilty of wanton endangerment in the first degree since an instruction on that crime was not warranted by the facts adduced at trial.

At the outset, it is admitted it would be proper under a certain set of facts to instruct on wanton endangerment in the first degree when a defendant has been charged with assault. For example, an instruction on this crime was warranted as to Appellant Ronnie Simpson in the case at bar because there was a valid question as to whether Ronnie actually struck and caused Trooper Raynes any physical injury. However, since there was no doubt that Appellant

Steve Simpson actually struck and caused Trooper Raynes some physical injury, there was no reason for instructing the jury that they could find Steve guilty of wanton endangerment in the first degree.

As it is clearly established in Ms. Brickey's treatise the crimes of wanton endangerment were enacted "to provide criminal sanctious when an actor has engaged in conduct but has caused no injury." Brickey, Kentucky Criminal Law §9.07 (Emphasis supplied).

This view is echoed by Justice Palmore's and Professor Lawson's Instructions To Juries In Kentucky when in dicussing the nature of the crime of wanton endangerment they stated that wanton endangerment

> "imposes criminal sanctious upon conduct which causes substantial risk of death or injury to another person. It is committed despite the fact that no real injury occurs. The conduct that is punishable under this offense would be sufficient to constitute assault... if a physical injury had resulted from the conduct" Id. at §2.20, Comment p. 78 (Emphasis supplied).

From these explanations it is quite obvious that in a trial where a defendant has been charged with assault, that defendant cannot be found guilty of wanton endangerment where it is clearly shown that that defendant actually struck the victim and caused him physical injury. Since it was clearly established during the trial below that Appellant Steve Simpson actually struck and caused Trooper Raynes physical injury, (See T.E., pp. 8-9; 21; 90; 92) the court below committed reversible error when it allowed the jury to find Steve guilty of wanton endangerment in the first degree.

Cases are legion in this jurisdiction that it is reversible error to instruct on a lesser included offense and to allow a jury to return a verdict of guilt on said instruction

if there is no evidence introduced at the trial to warrant such an instruction. See Sanders v. Commonwealth, Ky., 269 S.W.2d 208 (1954); Martin v. Commonwealth, Ky., 406 S.W.2d 843, 845 (1966); Sewell v. Commonwealth, 284 Ky. 183, 144 S.W.2d 233, 225 (1940).

Since the evidence introduced at trial in regards to Steve's conduct did not warrant the instruction on wanton endangerment in the first degree and a verdict of guilt on that charge, this Court must rectify the reversible error resulting from so instructing the jury by granting Appellant Steve Simpson a new trial.

II.

THE TRIAL COURT COMMITTED ERROR OF REVERSIBLE MAGNITUDE WHEN IT FAILED TO INSTRUCT ON WANTON ENDANGERMENT IN THE SECOND DEGREE.

At the close of all the evidence, after it became apparent that the trial court was only going to instruct the jury on wanton endangerment in the first degree, Appellant's trial counsel moved said court to also instruct on wanton endangerment in the second degree (T.E., p. 116). This motion was summarily overruled (Id.)

Appellants submit that the trial court committed error of reversible magnitude when it failed to so instruct the jury[1].

As explained by Justice Palmore and Professor Lawson both degrees of wanton endangerment impose "criminal sanctious upon conduct which causes substantial risk of

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[1] Obviously this assigned error is not applicable to Steve if this Court grants his relief under Argument I. However, should this Court determine that the evidence adduced at trial warranted an instruction on wanton endangerment in the first degree, as to Steve then this assigned error applies to Steve. For the purposes of this Argument only, it is to be assumed that the court below was correct in instructing on wanton endangerment in the first degree as to Steve.

death or injury to another person." Palmore and Lawson, Instructions To Juries In Kentucky, §2.20, Comment p. 78. In elucidating the difference between the two degrees of this crime Palmore and Lawson state:

> "[t]he statutes [KRS 508.060 and KRS 508.070 create two degrees of this offense, the only difference in the two being that the higher degree contemplates the existence of conduct which threatens death or serious injury and the lower degree conduct which threatens only non-serious physical injury. Id. (Emphasis supplied).

Appellants' trial counsel succeeded in belying the Commonwealth's contention that the Appellants seriously injured Raynes (See T.E., pp. 23-27; 31-32; 37-39). Of course, it is admitted that Raynes was injured as the result of the affray between himself and the Appellants. Obviously then the trial court should have instructed on wanton endangerment in the second degree. Its failure to do so constituted reversible error. See Harris v. Commonwealth, 218 Ky. 798, 292 S.W. 467, 468 (1927) and Hall v. Commonwealth, 219 Ky. 446, 293 S.W. 961, 963 (1927) for the proposition that it is reversible error for a trial court to fail "to instruct on any of the lesser degrees of the crime charged in the indictment, or on any of lesser crimes included within that charged in the indictment, where the evidence authorizes it." Id.

Accordingly, this Court should reverse Appellants convictions from the court below and should remand their cases to that court with directions to grant Appellants a new trial with proper instructions.

CONCLUSION

For the foregoing reasons, this Court should grant Appellants any and all relief to which they are entitled.

Respectfully submitted,

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